Supreme Court, U.S.
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No.

IN THE

Supreme Court of United States

OCTOBER TERM, 1995

JUDITH MCAULIFFE; CHARLES DECUIRRE; YOLANDA PEPPER; JOANN SERPICO; FAY SHIN; and PATRICIA BEST,

Petitioners,

v.

SHERWIN MANOR NURSING CENTER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners, nursing home surveyors for the Illinois Department of Public Health, allegedly engaged in anti-Jewish animus in citing a nursing care facility owned and operated by Orthodox Jews for public health violations. Pursuant to immediate administrative review, the Department withdrew those citations and the facility never lost its license or had its business interrupted. Finding that the random and unauthorized acts of state employees do not amount to a cognizable violation of 42 U.S.C. §1983 when any adverse impact flowing from them is cured on administrative review, the district court dismissed the facility's ensuing complaint. The Seventh Circuit reversed, holding that alleged equal protection violations, unlike their due process counterparts, occur at the time of commission and cure by state administrative review is no barrier to a §1983 claim. The Court also held that a private, profit motivated corporation may pursue a §1983 claim based on the First Amendment's protection of the free exercise of religion. The questions presented are:

I. Whether a state licensed nursing home that successfully avails itself of an established administrative remedy to cure the impact of the random and unauthorized acts of state employees and never loses it license or has its business interrupted suffers an injury of constitutional magnitude for purposes of pursuing equal protection and free exercise of religion claims under 42 U.S.C. §1983.

II. Whether the protections afforded individuals under the First Amendment's free exercise clause extend to a private business corporation so as to confer standing to bring a §1983 claim.

PARTIES TO THE PROCEEDING

(1) Petitioners Judith McAuliffe, Charles DeCuirre, Yolanda Pepper, Joann Serpico, Fay Chin, and Patricia Best, at all relevant times, were employed as surveyors for the Illinois Department of Public Health.

(2) Respondent Sherwin Manor Nursing Center, Inc. is a closely-held corporation which is not publicly traded or owned by a public company.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 37 F.3d 1216. (App. A, A-1 to A-10). The opinions of the district court on the motion to dismiss and the motion to alter or amend the judgment are unreported and may be found respectively at 1993 WL 98219 and 1993 WL 189814 (App. C, C-1 to C-16).

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on October 6, 1994. A timely petition for rehearing was denied on March 31, 1995. (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §1983 and §1985(3) are set out at App. D, D-1 to D-2.

STATEMENT

Sherwin Manor is a licensed long-term nursing care facility located in Chicago, Illinois, owned and operated by Orthodox Jews and serving a primarily Jewish clientele.(¶¶ 4-6).[1] The Illinois Department of Public Health ("IDPH") conducts an annual licensure and certification survey of long-term care facilities to determine compliance with federal and state regulations.(¶ 13). Petitioners were among the members of a state survey team which visited Sherwin Manor in December, 1991, to conduct the annual survey.(¶¶ 7-8).

Sherwin Manor alleges that petitioners, as the result of anti-Jewish sentiment, issued false findings asserting violations of federal and state public health regulations.(¶¶ 31-35).

Despite these allegedly false findings, Sherwin Manor's state license was never revoked, its business was never interrupted, and its federal certification was never withdrawn.(¶¶ 41-44). Upon review of the petitioners' findings within IDPH, supervising representatives, without conducting a new survey, withdrew the findings, unconditionally renewed Sherwin Manor's state license and recommended to the federal authorities that Sherwin Manor be unconditionally recertified.(¶¶ 39-44). Viewed in the light most favorable to plaintiff-respondent, the relevant facts in this case may be summarized as follows:

1. IDPH Annual Licensure and Certification Survey Procedure

Pursuant to state law, IDPH conducts annual licensure and certification surveys to determine a facility's compliance with federal and state regulations.(¶¶ 12; 13). The survey consists of reviews of medical charts, observation of the distribution of medication and the administration of treatment, resident interviews,

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[1] All paragraph references are to the complaint in this case.

observation of food preparation, inspection of the facility and interviews with the staff.(¶ 14).

At the conclusion of the survey, the surveyors, the health-care facility, and a resident representative engage in an "exit conference" to provide the facility with an opportunity to refute or explain the surveyors' findings. Rebutted findings are to be eliminated immediately from the findings.(¶ 20).

Following the exit conference, the survey team's findings are distributed to IDPH reviewers known as Quality Assurance. At that time, the facility has the opportunity to provide written responses to the findings and to submit new or the same rebuttal evidence.(¶ 21).

After reviewing the surveyors' findings and any rebuttal evidence, Quality Assurance determines whether to issue state level "A" or "B" violations or administrative warnings.(¶ 21).[2] Quality Assurance determines whether to issue state violations; the surveyor team itself decides whether there are federal violations. While federal decertification procedures are initiated if the surveyors' find federal level "A" or serious or repeat level "B" violations, a resurvey of the facility is required within 45 days in order to either finally determine the violations or withdraw the decertification procedure.(¶ 22).

2. Sherwin Manor's 1991 Survey

Sherwin Manor alleges that, during its December, 1991, survey, petitioners made several anti-Jewish comments and, as a result of anti-Jewish animus, reached biased and erroneous findings against the nursing home.(¶¶ 25, 26, 31, 32). Specifically, the defendants made "no less than 73 pages of false, fabricated and meritless findings and issued at least 28 meritless federal violations and at least 40 meritless state violations."(¶ 34). These

[2] Type "A" violations represent situations presenting a substantial probability that death or serious mental or physical harm to a resident will result; type "B" violations arise from a condition directly threatening to the health, safety or welfare of a resident.

findings triggered the initiation of federal decertification proceedings.(¶ 35).

Rather than wait for the review by the Quality Assurance team, Sherwin Manor met with supervising representatives of IDPH and presented taped, documentary and photographic evidence in order to refute the findings of the surveyors.(¶ 39). Except for the photographs, all of the evidence presented by Sherwin Manor to the supervising representatives of IDPH had already been prepared for the annual survey or as a part of Sherwin Manor's standard operating procedure.(¶ 40).

3. IDPH Action

Upon reviewing Sherwin Manor's evidence — and without conducting a new survey — IDPH withdrew 73 pages of the surveyors' findings, unconditionally renewed Sherwin Manor's state license and recommended to the federal authorities that Sherwin Manor be unconditionally recertified.(¶ 41). As a result, all findings that would have constituted state violations were withdrawn (¶ 42), all serious federal violations were withdrawn and the federal decertification process was discontinued.(¶ 43). The remaining findings were of a routine nature and not considered serious.(¶ 44).

Sherwin Manor's license was not revoked and its business operations were never interrupted.

4. The District Court's Decision

Sherwin Manor filed a two count complaint under 42 U.S.C. §1983 and §1985(3) alleging that petitioners violated its procedural and substantive due process and equal protection rights during the survey by engaging in "anti-Jewish" conduct and making false findings of state and federal public health violations.

The district court granted petitioners' Fed.R.Civ.P. 12(b)(6) motion to dismiss the complaint because Sherwin Manor failed to allege a deprivation of constitutional magnitude. Judge Williams found that, despite the alleged conduct of petitioners,

Sherwin Manor never lost its operating license or federal certification or had its business activity interrupted.

Pursuant to Fed.R.Civ.P. 59(e), respondent moved to alter or amend the judgment, contesting the district court's ruling with respect to its equal protection claim and raising, for the first time, a free exercise of religion claim (which had been articulated previously as a component of substantive due process). The district court denied the motion on the ground that Sherwin Manor failed to state a valid equal protection or free exercise claim because the complaint did not allege an injury of constitutional magnitude, licensing treatment different than that provided to similarly situated facilities or the imposition of a burden as a result of religious beliefs.

5. The Seventh Circuit's Decision

The Seventh Circuit reversed the decision of the district court, holding that, unlike a pure procedural due process claim, a §1983 complaint predicated upon equal protection and free exercise of religion claims states a cause of action despite the fact that adequate state remedies were available — and in fact utilized — to redress the grievance. Accordingly, the Court held that plaintiff could seek precisely the same type of damages that did not rise to the level of cognizable constitutional injury in the procedural due process context.

The Court did so by relying on this Court's jurisprudence in the unrelated context of when a cause of action accrues for purposes of employment discrimination.[3] Finding that the unconstitutional act was the discriminatory act itself, the Court held that the district court incorrectly extended the due process injury requirement to all §1983 cases.

Compounding the problem, the Court, without addressing this Court's precedent on the issue, held that a regulated business entity has standing to pursue a free exercise of religion

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[3] *See* Chardon v. Fernandez, 454 U.S. 6 (1981); Delaware State College v. Ricks, 449 U.S. 250 (1980).

claim. The Court's cryptic statement that the free exercise clause prohibits the imposition of burdens on victims because of their religious beliefs stands in bold contrast to this Court's concern for a host of important factors that impact on whether corporations have the full measure of First Amendment rights that individuals enjoy.

After considering a petition for rehearing and in banc suggestion for an extraordinarily long period between mid-October, 1994, and the end of March, 1995, the full court denied further review.

REASONS FOR GRANTING THE PETITION

I. The Question of When a §1983 Action Is Precluded By Virtue Of An Existing State Remedy To Cure The Impact Of The Random And Unauthorized Acts Of State Employees Has Generated Substantial Uncertainty Regarding The Role Of Civil Rights Litigation In Our Constitutional Order.

The random and unauthorized acts of state employees, whether or not intentional, are not cognizable as a §1983 due process claim when adequate state remedies are available to provide redress. *Hudson* v. *Palmer*, 468 U.S. 517 (1984); *Parratt* v. *Taylor*, 451 U.S. 527 (1981). While rejecting a litigant's right to circumvent *Parratt* by converting a procedural into a substantive due process claim,[4] the lower courts have held that "substantive violations of constitutional rights are not subject to the rule of *Parratt*."[5] However, the lack of certainty underpinning those

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[4] *See, e.g.*, Weimer v. Amed, 870 F.2d 1400, 1406 (8th Cir. 1989); Economic Development Corp. v. Stierheim, 782 F.2d 952, 953 n.1 (11th Cir. 1986).

[5] Morello v. James, 810 F.2d 344, 348 (2d Cir. 1987); *see also* Gilmere v. Atlanta, 774 F.2d 1495, 1500 (11th Cir. 1985) ("substantive claims are outside the scope of Parratt because the constitutional violation is complete at the moment when the harm occurs"); Augustine v. Doe, 740 F.2d 322, 327 (5th Cir. 1984) ("*Parratt* is irrelevant if the plaintiff alleges a violation of a substantive right protected by the Constitution against infringement by state governments").

decisions is evidenced by statements recognizing that the doctrinal base for the ruling is not immutable, but only an exception to *Parratt* "at least as interpreted thus far." *Mahoney* v. *Kesery*, 976 F.2d 1054, 1061 (7th Cir. 1992).

Although the court below is the third circuit to hold that equal protection claims are actionable notwithstanding available state remedies,[6] this Court has not addressed the issue. The result of this Court's "ambivalence over the outer limits of Parratt has been its dilution and, in some respects, its transformation into a mere pleading exercise." *Albright* v. *Oliver*, 114 S.Ct. 807, 819 (1994) (Kennedy, J. & Thomas, J., concurring in the judgment). This case began as a substantive and procedural due process claim and evolved into an equal protection and free exercise claim only on post-judgment motion.[7] Accordingly, it is a perfect example of Justice Kennedy's concern that "the *Parratt* rule has been avoided by . . . treating claims based on the Due Process Clause as claims based on some other constitutional provision." *Ibid.*

Thus, the issue warrants the Court's consideration because the decision below exacerbates the "substantial uncertainty

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[6] *See also* Watts v. Burkhart, 854 F.2d 839, 842-43 (6th Cir. 1988); Williams v. City of St. Louis, 783 F.2d 114, 118-19 (8th Cir. 1986).

[7] Respondent's pleadings relied almost solely on due process as the basis for recovery. In its decision on respondent's Rule 59(e) motion, the district court noted:

> Plantiff only objects to this court's determination that is free exercise and equal protection claims should be dismissed . . . . In the original motion, plaintiff only devoted approximately 1 page to these claims. Rather than explaining how defendants' actions violated these constitutional rights, plaintiff merely asserted that the free exercise clause prohibited the imposition of burdens on persons because of their religious beliefs and the equal protection clause prohibited discrimination on the basis of religion. (App. C 13).

After realizing that its due process claim was barred by *Parratt* respondent focused its attention on allegations of substantive contitutional violations. At the appellate level respondent abandoned its due process claim altogether.

regarding both the analytic structure of 42 U.S.C. §1983 jurisprudence and the role civil rights litigation pursuant to section 1983 should play in our constitutional order." *Mann* v. *City of Tucson*, 782 F.2d 790, 794 (9th Cir. 1986) (Sneed, J., concurring). That uncertainty can and should be ameliorated by a clear rule holding that "where an injury has been caused not by state law, policy or procedure, but by a random and unauthorized act that can be remedied by state law, there is no basis for intervention under §1983 . . . ." *Albright*, 114 S.Ct. at 819 (Kennedy, J., concurring).

Neither the language of §1983 nor the rationale of *Parratt* suggests a distinction between due process and equal protection for purposes of whether a federal claim is viable in light of an adequate state remedy. Under the literal terms of the statute, liability is imposed for causing "the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . ." 42 U.S.C. §1983. The text itself does not distinguish procedural due process from the panoply of constitutional and federal statutory rights otherwise secured.

Likewise, the *Parratt* rationale does not draw the distinction seen by the court below. Rather, this Court focused on the appropriate role of §1983 in light of our dual sovereignty system. It concluded that situations "involving a tortious loss of . . . property as a result of a random and unauthorized act by a state employee . . . is not a result of some established state procedure and beyond the control of the State." 451 U.S. at 541. Accordingly, it reached a result that would avoid making "of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." 451 U.S. at 544.

The same analysis that circumscribes the reach of §1983 to claims based on substantive due process, *Albright*, 114 S.Ct. at 812-13 (and cases there cited), applies with equal force to the equal protection clause. "It is not the province of [federal courts] to create substantive rights in the name of guaranteeing equal protection of the laws." *San Antonio Ind. School Dist.* v.

Rodriguez, 411 U.S. 1, 33 (1973). Thus, the generic nature of the equal protection clause makes it more akin to the due process clause than rights otherwise specifically afforded.

This is compelling on the facts at bar. The complaint does not allege that the state system of grievance review (under which respondent's rights were vindicated) was more burdensome for respondent than similarly situated nursing homes. The licensure and certification survey conducted by petitioners was part of the annual review process required by state law for all long term nursing care facilities. As part of this annual, routine process, petitioners made findings which necessarily would be reviewed and evaluated by the Quality Assurance division. The Quality Assurance division's final decision regarding the issuance of state violations and administrative warnings contemplates review of both the surveyors' findings and evidence presented by the nursing home.(¶ 21).

Rather than awaiting review by the Quality Assurance division in the normal course, Sherwin Manor decided on its own initiative to schedule a meeting with IDPH supervisors and present the same evidence that it presented to the surveyors (along with additional photographs).(¶ 40). Accordingly, the actions of petitioners did not impose a burden on Sherwin Manor in any way other than compliance with the typical review procedure would have.

Finally, the availability of a §1983 remedy should not turn on two words in a complaint. Many regulated business entities, particularly in the nursing home area, have sectarian ownership or management. The fact that they can easily convert disparaging comments by state inspectors into an equal protection claim should not be determinative. "[T]he flexible manner in which constitutional injuries can be stated strongly suggests that the procedural-substantive due process distinction has no roots in logic." *Mann*, 782 F.2d at 797 (Sneed, J., concurring) (footnote omitted).

The absence of a clear rule defining the parameters of *Parratt* provides fodder for the commentators who claim that the courts have "succeeded only in sowing ambiguity and incoherence in section 1983 jurisprudence."[8] Given the number of §1983 complaints that are filed, a coherent policy that refines the scope of the remedy for the bench and bar would conserve future resources and properly allocate the division of responsibility between state and federal forums.

II. The Seventh Circuit Clearly Erred In Assuming That a Private, Profit-motivated Business Entity Could Raise a First Amendment Free Exercise Of Religion Claim Without Considering The Nature, History And Purpose Of The Particular Constitutional Guarantee.

To the extent that adequate state remedies do not remove all random and unauthorized acts from the scope of §1983, the lower court's cursory consideration of respondent's free exercise of religion claim is sufficient to warrant review, because the issue of whether an institution has a right of free exercise is, of itself, a "perplexing legal question." *Brown* v. *Dade Christian Schools, Inc.*, 556 F.2d 310, 313 (5th Cir. 1977) (in banc). Respondent is, after all, a profit-motivated, privately owned business entity subject to a state licensing system.[9] In undergoing the processes associated with relicensing, respondent was not — and could not have been — practicing religion.

In *First Nat'l. Bank of Boston* v. *Bellotti*, 435 U.S. 765, 777 (1978), this Court left open the "abstract question of whether corporations have the full measure of rights that individuals enjoy under the First Amendment." However, after cataloging several rights that corporations do not possess, such as the privilege against self-incrimination and the right of privacy, the Court

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[8] Zagrans, *"Under Color of" What Law: A Reconstructed Model of Section 1983 Liability*, 71 U.Va.L.Rev. 499, 503 (1985).

[9] As a private business entity, respondent has no claim to associational standing as a religious organization. *Cf.* Bob Jones University v. United States, 461 U.S. 574 (1983) (assuming without deciding the standing issue as to religious organization).

suggested that, "[w]hether or not a particular guarantee is 'purely personal' or is unavailable to corporations for some other reason depends on the nature, history, and purpose of the particular constitutional provision." 435 U.S. at 778 n. 14. The court below failed to engage in any analysis, but rather, in a single paragraph, held that any "victim" of a burden on religious beliefs could proceed under §1983.

"As is plain from its text, the First Amendment was adopted to curtail the power of Congress to interfere with the *individual's* freedom to believe, to worship, and to express himself in accordance with the dictates of his own conscience." *Wallace* v. *Jaffree*, 472 U.S. 38, 49 (1985) (emphasis added). Because of this, this Court has consistently viewed free exercise as a uniquely individual right. For example, in *Harris* v. *McRae*, 448 U.S. 297, 320-21 (1980), the Court found that the Board of a religious entity did not have standing as an organization to contest a statute prohibiting the Medicaid funding of abortions. "Since 'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion,' the claim asserted here is one that ordinarily requires individual participation." 448 U.S. at 321, *quoting, Abington School Dist.* v. *Schempp*, 374 U.S. 203, 223 (1963). *See also Board of Education* v. *Allen*, 392 U.S. 236, 249 (1968) (free exercise clause is not violated when plaintiffs did not contend that the challenged act operated "in any way [to] coerce them as individuals in the practice of their religion").

Moreover, because respondent voluntarily sought the meeting with IDPH supervisory personnel to resolve a business problem allegedly engendered by anti-Jewish animus, the complaint does not allege that it was subjected to a "a substantial burden on the observation of a central religious belief or practice . . . ." *Jimmy Swaggart Ministries* v. *California Bd. of Equalization*, 493 U.S. 378, 384-85 (1990). *Compare Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 113 S.Ct. 2217, 2222 (1993).

The Seventh Circuit's failure to address this issue, let alone explain why respondent, as a business entity, has standing to assert a free exercise claim independently justifies the review.

CONCLUSION

For these reasons, a writ of certiorari should be granted to review and ultimately reverse the decision below.

Respectfully submitted,

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APPENDIX

No. 93-2625

IN THE

United States Court of Appeals
For the Seventh Circuit

SHERWIN MANOR NURSING CENTER, INC.

Plaintiff-Appellant,

v.

JUDITH MCAULIFFE; CHARLES DECURRE; YOLANDA PEPPER; JOANN SERPICO; FAY CHIN; and PATRICIA BEST,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION.
NO. 92 C 6659—ANN CLAIRE WILLIAMS, *Judge*.

ARGUED JANUARY 11, 1994—DECIDED OCTOBER 6, 1994

Before CUDAHY and FLAUM, *Circuit Judges*, and SHARP, *District Judge*. *

CUDAHY, *Circuit Judge*. Sherwin Manor Nursing Center, Inc. (Sherwin), alleges that Illinois state licensing officials falsely cited the facility and discriminated against it because Sherwin's owners are Jewish. It contends that the officials' actions denied Sherwin both the equal protection of the laws in violation of the Fourteenth Amendment and interfered with its right to the free exercise of religion in violation of the First Amendment. The district court dismissed Sherwin's § 1983 complaint for failure to state a claim. We reverse.

* The Honorable Allen Sharp, Chief Judge, of the United States District Court for the Northern District of Indiana is sitting by designation.

I.

Sherwin is a licensed long-term nursing care facility, owned and operated by orthodox Jews and serving a primarily Jewish clientele. Historically, Sherwin had always garnered high marks in the annual licensure and certification survey by the Illinois Department of Public Health (Department). In December 1991, however, the defendants—six surveyors from the Department—purported to find multiple violations based on a two-week survey of the facility. The defendants then compiled a 124-page report, most of which included, Sherwin claims, "false, fabricated and meritless findings." Complaint ¶ 34. According to Sherwin, the defendants erroneously found that Sherwin's facility lacked no-smoking signs, that its records were unavailable, that it lacked a quality assurance program, that its facility was "thick" with soil and smelled of urine, that the menu did not provide a varied diet because it did not include pork and that residents were not given a program of activities. The report noted 28 federal violations and at least 400 state violations. The submission of the allegedly biased survey immediately triggered the initiation of federal decertification proceedings.

Sherwin contends that the findings were based not on fact but on the surveyors' religious prejudice. Sherwin alleges, as evidence of the defendants' anti-Semitic animus, that the defendants made the following insulting and offensive statements:

"They are Jews, you can't trust them."

"She's a Jew and a liar—you can't trust her."

"These Jews, they hire Pollacks who can't read or speak English."

"These Jews, they don't tell anyone they have a Kosher kitchen."

"They are terrible, vicious, rotten people."

At the conclusion of the survey, Sherwin and its attorneys met with the supervising representatives of the Department and presented taped, documentary and photographic evidence establishing that most of the defendants' findings were erroneous.[1] (As alleged, Sherwin thereby bypassed the opportunity to respond in writing to the Department's Quality Assurance Division.) The Department then withdrew 73 pages of the surveyors' findings, unconditionally renewed Sherwin's state license and recommended to the federal authorities that Sherwin be unconditionally recertified. All findings that would have comprised state violations were withdrawn, as were all serious federal violations.

On October 2, 1992, Sherwin filed a two-count complaint under 42 U.S.C. § 1983 and § 1985(3) seeking, on each count, actual damages, punitive damages, costs and attorneys' fees. Sherwin based these claims on theories of due process, equal protection, free exercise and conspiracy. The district court on March 31, 1993, dismissed the complaint under Fed. R. Civ. P. 12(b)(6), holding that *Reichenberger* v. *Pritchard*, 660 F.2d 280 (7th Cir. 1981), and *Easter House* v. *Felder*, 910 F.2d 1387 (7th Cir. 1990) (en banc), *cert. denied*, 498 U.S. 1067 (1991), required dismissal. Most critically, the district court found that Sherwin had not suffered an actual constitutional injury. The court noted that Sherwin had not experienced any business interruption as a result of the surveyors' actions. Its operating license and federal certification remained intact, and most of the alleged violations were withdrawn by the Department. Memorandum of March 31, 1993 at 8. The court also noted that the only tangible injury suffered by Sherwin was the cost of defending itself before the Quality Assurance Division of the Department, which according to the court did not rise to the level of a constitutional injury "in

[1] Except for the photographs, the evidence presented to the Department's representatives had already been presented to the defendants during the survey and at the "exit conference" at the end of the survey period.

a valid § 1983 claim." *Id.*[2] Absent a showing of injury, the court held that the legal fees and costs incurred by Sherwin were not recoverable as compensatory damages.

Sherwin then moved under Rule 59(e) to amend the order dismissing the complaint, asking the district court to reconsider the equal protection and free exercise claims. The court denied the motion, underscoring again the absence of an injury of constitutional magnitude. The court also concluded that Sherwin had not shown that it was treated differently than other similarly situated facilities since violations lodged against nursing homes were automatically reviewed by the Department and this review provided all with a level playing field.

Sherwin, in its appeal of the district court's dismissal, has discarded its due process theories and instead relies upon the equal protection, free exercise and § 1985(3) conspiracy claims.

II.

We review the grant of a motion to dismiss *de novo*, accepting "the truth of all well-pleaded allegations and making all possible inferences in favor of the plaintiff." *Wroblewski* v. *City of Washburn*, 965 F.2d 452, 453 (7th Cir. 1992) (quoting *Prince* v. *Rescorp Realty*, 940 F.2d 1104, 1106 (7th Cir. 1991)). Dismissal is not warranted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled him to relief." *Conley* v. *Gibson*, 335 U.S. 41, 45-46 (1957). Further, a court may not, in cases under § 1983, apply a pleading standard that is more stringent than the notice pleading required by the Federal Rules. *Leatherman* v. *Tarrant County Narcotics Unit*, 113 S. Ct. 1160 (1993).

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[2] In finding that Sherwin defended itself before Quality Assurance, the district court failed to take the well-pleaded allegations of Sherwin's complaint as true. The complaint alleges that Sherwin communicated and met with supervising representatives of IDPH, not that they responded to the survey in writing as allowed for appeals to Quality Assurance. *Compare* Complaint ¶ 39 *with id.* ¶ 21.

A. *Deprivation of Constitutional Magnitude*

The crux of the district court's analysis under each of the three theories before us on appeal is that Sherwin's claims failed to demonstrate injuries of "constitutional magnitude." Without such an injury, the court reasoned, Sherwin could not recover attorneys' fees as compensatory damages. *See Reichenberger*, 660 F.2d at 285 ("legal fees expended by the plaintiffs in the administrative proceedings cannot qualify as a constitutional injury absent a showing of deprivation of constitutional magnitude"). As indicated, the district court purported to base its reasoning on our decisions in *Easter House* and *Reichenberger*. In *Easter House*, a private adoption agency brought a § 1983 action against a former employee and officials of a state licensing agency, alleging a conspiracy to deprive it of its operating license. Easter House's only alleged injuries were the cost of answering the questions of the licensing agency and of making files available to it. *Easter House*, 910 F.2d at 1407. We concluded that neither of these "injuries" rose to the level of a procedural due process deprivation, holding that a party cannot maintain a § 1983 action for denial of procedural due process if the alleged violations are committed by state employees acting in a "random and unauthorized" manner and adequate state remedies are available. *Id.* at 1408.

In *Reichenberger* the plaintiffs owned nightclubs that featured nude dancing, and the defendants, a minister and a member of the Common Council, allegedly conspired to eliminate the nude dancing. The complaint asserted that the defendants attempted to interfere in various municipal administrative proceedings in order to revoke the plaintiffs' liquor licenses or to make the cost of renewing the licenses prohibitively expensive. *Id.* at 282. As a result, the plaintiffs alleged both an abridgment of their free speech rights and a procedural due process claim—in that they were deprived of a property interest without due

process.[3] The *Reichenberger* court, however, found that the complaint did not allege either a procedural due process or a First Amendment injury, since the plaintiffs' expressive and business activities were not interrupted or curtailed and since the defendants' opposition to Reichenberger's activities did not require the plaintiffs to respond to inquiries to which they were not otherwise required to respond. Thus, we affirmed the dismissal of the complaint, noting the plaintiffs' "threshold inability to allege injury or deprivation of constitutional rights." *Id.* at 288. *Reichenberger* stands for the proposition that impermissibly motivated government conduct that does not cause "injury" is not actionable.[4] Therefore, an individual who is required to respond to inquiries to which everyone else, in ordinary course, is also required to respond has not suffered a constitutional injury of any kind, even if the relevant government actor makes the customary inquiry animated by impermissible prejudice.

By dismissing the complaint because Sherwin never lost its license or certification and because Sherwin took advantage of a post-survey remedy, the district court, it appears, mistakenly blurred the distinction between procedural due process injuries and other constitutional injuries. The Fourteenth Amendment prohibits the states from depriving "any person of life, liberty, or property, without due process of law." A procedural due process claim necessitates "a property deprivation of constitutional magnitude" and, of course, one effected without due process. *Easter House*, 910 F.2d at 1407. In comparison with other constitutional claims such as equal protection or free exercise, a cognizable

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[3] The plaintiffs also alleged a § 1985 violation, which prohibits "conspiracies" to interfere with the exercise of constitutional rights. The court's conclusion that the plaintiffs suffered no constitutional injury applied equally to the claims brought under § 1983 and § 1985.

[4] This requirement is simply another way of stating the requirement for standing in federal court that the plaintiff has suffered an "injury in fact." See *Lujan* v. *Defenders of Wildlife*, 112 S. Ct. 2130, 2136 (1992) (to establish standing, plaintiff must have suffered invasion of a legally-protected interest which is concrete and particularized and which is actual and imminent rather than hypothetical).

procedural due process claim does not typically arise until the proceedings are at a mature stage and due process has not been furnished, even though a tangible deprivation has occurred.

By contrast, simply because they are not "procedural due process" injuries, other constitutional harms may arise no matter how much process is afforded. For example, an equal protection cause of action accrues whenever a state "den[ies] to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. To state an equal protection claim, a § 1983 plaintiff must allege that a state actor purposefully discriminated against him because of his identification with a particular (presumably historically disadvantaged) group. See *Shango* v. *Jurich*, 681 F.2d 1091, 1103-04 (7th Cir. 1982); *Washington* v. *Davis*, 426 U.S. 229, 247-48 (1976). As this court observed recently in *Triad Associates, Inc.* v. *Robinson*, "governmental disregard of the fundamental dictate of equal treatment is the beginning and end of the equal protection inquiry." 10 F.3d 492, 500 (7th Cir. 1993).[5]

Sherwin presents a cognizable equal protection claim since it alleges that it was subjected to differential treatment by the state surveyors based upon the surveyors' anti-Semitic animus. The district court incorrectly extended the due process injury

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[5] The Supreme Court has addressed the related question of when a cause of action accrues in the context of employment discrimination. In *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), and *Chardon* v. *Fernandez*, 454 U.S. 6 (1981), the Court attempted to identify the time when an alleged discriminatory employment practice accrues so as to commence the running of the statute of limitations. In *Ricks*, the complaint alleged employment discrimination on the basis of national origin in violation of Title VII and 42 U.S.C. § 1981; in *Chardon*, the suit alleged discrimination on the basis of First Amendment political activities under 42 U.S.C. § 1983. The Court held in each case that the proper focus is upon the time of the discriminatory act rather than the time at which the consequences of the act become evident and painful. *Ricks*, 449 U.S. at 258; *Chardon*, 454 U.S. at 8. Thus, the Court concluded that the cause of action accrued when the employee was notified of the alleged discriminatory discharge and not when the employee was terminated.

(footnote continues)

requirement of *Easter House* to all § 1983 cases. The defendants' anti-Semitic remarks may not by themselves give rise to an equal protection action by Sherwin. See *Bell* v. *City of Milwaukee*, 746 F.2d 1205, 1259 (7th Cir. 1984) ("derogatory references to racial or ethnic backgrounds by themselves obviously do not rise to the level of a constitutional violation"). However, such verbal abuse accompanied by the imposition of a special administrative burden forms the basis of an equal protection claim. Further, unlike the plaintiffs in *Reichenberger*, Sherwin *does* have a constitutional right not to endure the complained of administrative burden; the state survey alleged by Sherwin was in no sense "ordinary" (a description that suggests relatively minor evaluation "errors" by the defendants) but, as alleged, amounted to a malicious broadside that so threatened Sherwin's interests that it prompted the nursing home to resort to the extraordinary measure of hiring attorneys and appealing directly to supervisors in the Department, rather than awaiting review by the Department's Quality Assurance Division.

The Ninth Circuit, in *Flores* v. *Pierce*, 617 F.2d 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1980), reached a similar conclusion. In *Flores*, two Mexican-Americans attempted to open a restaurant and bar in a town that they anticipated would cater in large part to Mexican-Americans. They applied for a liquor license to the Department of Alcoholic Beverage Control of the State of California (ABC), prompting an official protest from the town's police chief, mayor and city council. *Id.* at 1388. Under

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(footnote continued)

In contrast to *Ricks* and *Chardon*, the accrual analysis is altogether different when the violation is predicated upon a procedural due process claim. In a case recently decided by this court, *Lawshe* v. *Simpson*, 16 F.3d 1475 (7th Cir. 1994), we held that a claim for deprivation of public employment without due process accrues on the actual termination of employment and not on the date on which the plaintiff is notified of the termination. *Id.* at 1480. In *Lawshe* as in *Reichenberger* and *Easter House*, the unconstitutional act was the deprivation, *without procedural due process*, of a property interest: the continuation of one's job or business. In *Ricks* and *Chardon*, as in the instant case, the unconstitutional act was the discriminatory act itself.

California law at that time, when a city chose to protest a liquor license application, that protest operated to block issuance of the license until a hearing was held. The Floreses' license was initially denied but was later granted by the ABC Appeals Board. The Floreses then brought suit for damages under 42 U.S.C. § 1983. The court found that the defendants violated the Floreses' equal protection rights by discriminating against them on the basis of race or national origin. *Id.* at 1390.

Like Sherwin, the plaintiffs in *Flores* were ultimately made whole: the Floreses in the end received the liquor license. Nonetheless, the Ninth Circuit held that there had been a sufficient allegation of injury:

> The violation here consisted not in the ABC's initial denial of the license, but in the policy of the city officials to force the applicants to undertake extraordinary measures for its issuance. If the rigors of the governmental or administrative process are imposed upon certain persons with an intent to burden, hinder, or punish them by reason of their race or national origin, then this imposition constitutes a denial of equal protection, notwithstanding the right of the affected persons to secure the benefits they seek by pursuing further legal procedures.

Id. at 1391. Just as the Floreses were forced to appeal the denial of their liquor license application, so too was Sherwin forced to take extraordinary measures in appealing the biased report to the Department. Because the claims of the Floreses and Sherwin were properly grounded in equal protection rather than in procedural due process, the fact that further legal procedures cured the violation against property—i.e., furnished due process—affects only the quantum of damages, not whether the plaintiffs' equal protection rights were violated.

B. *Damages*

Since, unlike the district court, we conclude that Sherwin adequately alleged a constitutional injury in the denial of equal

protection, Sherwin presumably has a right to recover its legal fees, should it prevail. This result is consonant with our holding in *Kerr* v. *City of Chicago*, 424 F.2d 1134, 1141 (7th Cir. 1970):

> A plaintiff in a civil rights action should be allowed to recover the attorneys' fees in a state criminal action where the expenditure is a foreseeable result of the acts of the defendant.

We, of course, need not decide here whether Sherwin was forced to take extraordinary measures and thus incur attorneys' fees; that question is one for the finder of fact.[6]

III.

Just as the lack of constitutional injury has been erroneously applied to the equal protection claim, this erroneous application may not negate a proper free exercise or § 1985(3) conspiracy claim.[7] The district court also concluded that Sherwin did not state its free exercise claim clearly enough to apprise the defendants of the claims against them, as required by Fed. R. Civ. P. 8 and *Conley* v. *Gibson*, 355 U.S. 41 (1957). We disagree. As the district court itself noted, the free exercise clause prohibits the imposition of burdens on victims because of their religious beliefs, *McDaniel* v. *Paty*, 435 U.S. 618 (1978), and Sherwin's complaint clearly alleged anti-Semitic animus and conduct involving, *inter alia*, criticism of Sherwin's meal offerings because of its adherence to kosher laws. It seems clear enough to us that the complaint put the defendants on notice of a free exercise claim.

REVERSED

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[6] We note, however, that the *Flores* court affirmed a $48,500 damage award for the plaintiffs that included a calculation for "additional attorneys' fees." *Flores*, 617 F.2d at 1392. The costs were "additional" because they were incurred in the effort "to undertake extraordinary measures" for the issuance of the license against the opposition of the state officials.

[7] Both claims arise no matter how much process is afforded and thus they are complete without respect to the availability of due process.

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604

March 31, 1995

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. ALLEN SHARP, District Judge*

SHERWIN MANOR NURSING CENTER, INC.,

Plaintiff-Appellant.

No. 93-2625 *v.*

JUDITH MCAULIFFE; CHARLES DECUIRRE; YOLANDA PEPPER; JO ANN SERPICO; FAY CHIN; and PATRICIA BEST,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 92 C 6659
Ann Claire Williams, *Judge*.

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by the defendants-appellees in the above-entitled case, no judge in active service requested a vote thereon and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition be, and is hereby, DENIED.

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* The Honorable Allen Sharp, Chief Judge of the United States District Court for the Northern District of Indiana, is sitting by designation.

IN THE

United States District Court
For The Northern District Of Illinois

EASTERN DIVISION

SHERWIN MANOR NURSING CENTER, INC.,

Plaintiff,

v.

JUDITH MCAULIFFE, CHARLES DECUIRRE, YOLANDA PEPPER, JOANN SERPICO, FAY CHIN, and PATRICIA BEST,

Defendants.

Case No. 92 C 6659

MEMORANDUM OPINION AND ORDER

Plaintiff Sherwin Manor Nursing Center, Inc. ("Sherwin Manor") brought this action against defendants Judith McAuliffe, Charles DeCuirre, Yolanda Pepper, Joann Serpico, Fay Chin, and Patricia Best ("defendants"), alleging that defendants deprived plaintiff of its due process rights under the First and Fourteenth Amendments, its free exercise rights under the First Amendment, and its right to equal protection under the Fourteenth Amendment in violation of 42 U.S.C. §§ 1983 and 1985 ("Sections 1983 and 1985"). This case is now before the court on defendants' motion to dismiss plaintiff's complaint for failure to state a claim for which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6) ("Rule 12(b)(6)"). For the reasons stated below, defendants' motion to dismiss is granted.

Background

According to the allegations in plaintiff's complaint, Sherwin Manor is a long-term care nursing facility and approximately 80% of its residents are Jewish. Sherwin Manor's owners and operators are also Jewish and observe the laws, customs, and rituals of Orthodox Judaism at their nursing home. Defendants

are surveyors for the Illinois Department of Public Health ("IDPH") whose responsibilities include conducting annual licensure and certification surveys of long-term care facilities, such as Sherwin Manor, to determine compliance with federal and state regulations.

At the conclusion of IDPH surveys, surveyors conduct an exit conference during which the reviewed facility can present evidence to refute survey findings. Findings which are adequately rebutted are eliminated from the surveyors' report. The surveyors' report is then passed on to IDPH reviewers known as Quality Assurance. Facilities are then given a second opportunity to refute survey findings before Quality Assurance decides whether to issue state level "A" or "B" violations, or administrative warnings.

If surveyors find that a facility fails to comply with applicable state regulations, IDPH cites them with state violations and lists them in its Quarterly List of Violators. This list is distributed to referral sources and lending institutions. Survey findings can also result in the withholding of Quality Incentive Program ("QUIP") funds which are awarded to Medicaid-eligible facilities, such as Sherwin Manor, for providing a level of care beyond that required by applicable regulations. Survey findings may also result in delicensure, suspension of a facility's unconditional license, termination from the Medicare program, adverse publicity, loss of referrals, loss of business reputation, loss of good will, loss of revenue, and a loss of residents.

The survey team alone is responsible for determining whether a facility has committed any federal violations. If the surveyors determine that there has been a federal level "A" or serious repeat level "B" violation, federal decertification proceedings are begun. Once decertification proceedings are begun, a resurvey of the facility is required within 45 days.

On December 9, 1991, defendants conducted Sherwin Manor's survey. Plaintiff alleges that during the two week survey, defendants subjected Sherwin Manor's staff and residents to

anti-Jewish remarks and conduct. Plaintiff further claims that defendants fabricated violations and refused to eliminate these fabricated findings from their report despite their having been adequately rebutted during Sherwin Manor's exit conference. Plaintiff claims that defendants issued a 124 page report of alleged federal and state violations, the majority of which were meritless and false. Defendants' findings potentially exposed Sherwin Manor to being issued five state level "A" and "B" violations. And, since defendants cited Sherwin Manor with five federal level "A" violations and approximately fifty-one federal level "B" violations, federal decertification proceedings were begun against Sherwin Manor.

When Sherwin Manor's survey was reviewed by Quality Assurance, plaintiff claims that it presented the hearing committee with almost exactly the same evidence that it presented to defendants during Sherwin Manor's exit conference. However, this time, Quality Assurance found that plaintiff's evidence adequately rebutted the majority of the disputed survey findings. Quality Assurance withdrew 73 pages of defendants' findings, unconditionally renewed Sherwin Manor's license, and recommended to federal authorities that Sherwin Manor be unconditionally recertified. Quality Assurance also withdrew all state level findings and never issued any state violations. The few violations which remained were routine and not considered serious.

Sherwin Manor subsequently filed this law suit, claiming that defendants' conduct was arbitrary and discriminatory, and that defendants found numerous state and federal violations merely because Sherwin Manor's owners are Jewish. Plaintiff claims that defendants' conduct deprived it of its due process rights under the First and Fourteenth Amendments, its free exercise clause rights under the First Amendment, and its right to equal protection under the Fourteenth Amendment in violation of Sections 1983 and 1985.

The Motion to Dismiss

Rule 12(b)(6) allows a defendant to attack an action based on the sufficiency of the pleadings, rather than on the merits of the claim alleged. Fed. R. Civ. P. 12(b)(6). A complaint should be dismissed under Rule 12(b)(6) only when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley* v. *Gibson*, 355 U.S. 41, 45-46 (1957). When considering a motion to dismiss for failure to state a claim, the court must consider all allegations in the complaint in the light most favorable to the plaintiffs, *Sheuer* v. *Rhodes*, 416 U.S. 232, 236 (1974), and take all well-pleaded facts and allegations as true. *Ed Miniat, Inc.* v. *Globe Life Ins. Group, Inc.*, 805 F.2d 732, 733 (7th Cir. 1986).

To state a valid Section 1983 claim, a plaintiff must establish that: (1) the conduct complained of was committed by a person acting under the color of state law, and (2) this conduct deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States. *New Burnham Prairie Homes* v. *Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990) (citing *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981)). Defendants' concede for the purposes of this motion that plaintiff adequately demonstrates that defendants were acting under the color of state law. Therefore, this court need only consider whether defendants' alleged actions violated plaintiff's constitutional rights.

In its complaint, plaintiff alleges that defendants' actions violated its due process rights under the First and Fourteenth Amendments. Defendant moves to dismiss this claim because plaintiff does not adequately establish that it suffered from an actual deprivation of its constitutional rights. Defendant further argues that this claim should be dismissed because plaintiff had an adequate post-deprivation remedy available to it.

To successfully establish a violation of constitutional magnitude as is required to state a valid Section 1983 claim, a plaintiff

must meet the threshold requirement of alleging that the defendant's conduct resulted in an actual deprivation of his or her rights. *Reichenberger* v. *Pritchard*, 660 F.2d 280, 285 (7th Cir. 1981); *Lesser* v. *Braniff Airways, Inc.*, 518 F.2d 538, 540 n.2 (7th Cir. 1975). "The mere possibility of remote or speculative future injury or invasion of rights will not suffice." *Id.*; *see Carey* v. *Piphus*, 435 U.S. 247, 253 (1978).

The Seventh Circuit's decision in *Reichenberger*, 660 F.2d 280, is instructive on this point. In *Reichenberger*, plaintiffs owned nightclubs which featured nude dancing. Plaintiffs alleged in their complaint that the defendants attempted to interfere in municipal administrative proceedings in their attempt to have plaintiffs' liquor licenses revoked or to make the cost of renewing their liquor licenses prohibitively expensive. Plaintiffs claimed that defendants' actions interfered with their First Amendment and due process rights in violation of Section 1983. *Id.* at 282-84. While plaintiffs were required to participate in several municipal proceedings regarding their nightclubs, they never lost their liquor license and their nightclubs continued to operate without interruption. Upon review of these factors, the Seventh Circuit dismissed their Section 1983 claim because plaintiffs did not suffer an actual constitutional injury. Despite defendants' interference, plaintiffs were not deprived of their liquor licenses nor were their nightclubs shut down. *Id.* at 285.

Like *Reichenberger*, plaintiff has not suffered an actual constitutional injury. Sherwin Manor never lost its operating license or its federal certification. The federal decertification proceedings were cancelled and the majority of violations defendants assessed against Sherwin Manor were withdrawn by Quality Assurance. Plaintiff concedes that the violations which remained were legitimate. Moreover, Sherwin Manor's business activity was never interrupted as a result of defendant's conduct. Thus, like *Reichenberger*, despite defendants' alleged actions, plaintiff has not suffered a constitutional injury.

The only actual injury which Sherwin Manor claims to have suffered is the cost of presenting evidence to refute defendants

findings before the Quality Assurance committee. However, the Seventh Circuit has clearly established that such costs do not demonstrate a deprivation of constitutional magnitude as required for a valid Section 1983 claim. *See Easter House* v. *Felder*, 910 F.2d 1387, 1407 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 783 (1991). Since plaintiff fails to adequately allege that it suffered an actual constitutional injury, this court finds that plaintiff's due process portion of its Section 1983 claim must be dismissed.

Even if plaintiff could overcome this threshold requirement, its due process claim would still fail because plaintiff was afforded and took advantage of an adequate post-deprivation remedy. Random and unauthorized acts of state actors do not violate due process if a meaningful post-deprivation remedy for the loss is available. *Hudson* v. *Palmer*, 468 U.S. 517, 533 (1984). In the instant case, plaintiff's complaint does not suggest that defendants' conduct was part of an IDPH scheme to harass the nursing home. Rather, it appears that defendants' alleged "anti-Jewish" conduct was independent and not based on official policy.

Plaintiff's complaint also clearly demonstrates that it was afforded and enjoyed an effective post-survey remedy. After the conclusion of the survey, plaintiff was given the opportunity to present rebuttal evidence to Quality Assurance. This resulted in the withdrawal 73 pages of defendants' findings, no state level "A" or "B" violations being issued, and the discontinuation of the federal decertification procedure. Therefore, plaintiff's due process claim must also fail because it was afforded an adequate post-deprivation remedy.

Plaintiff counters that defendants have misconstrued its complaint by considering its claim a procedural due process claim, rather than a substantive due process claim as plaintiff intended. Upon careful review of plaintiff's complaint, this court agrees with defendants that it is far from apparent that plaintiff

was raising a substantive due process claim rather than a procedural due process claim. Plaintiff's alleged substantive due process claim can be dismissed on this basis alone. To survive a motion to dismiss, a claimant need not set out the facts of his or her claim in detail. However, the modern criteria of notice pleading, does not alter the requirement that a plaintiff provide the defendant with fair notice of his or her claims and allege each essential element required to show violations of the laws claimed. *Conley*, 355 U.S. at 47; *United States* v. *Employing Plasterers Ass'n*, 347 U.S. 186, 189 (1953). In this instance, plaintiff has clearly failed to adequately apprise defendants of its claim and to demonstrate the essential elements of this claim.

Even if plaintiff's substantive due process claim could not be dismissed on this basis, this claim still cannot survive defendants' motion to dismiss. While procedural due process assures fair procedure in the decision-making process, substantive due process is concerned with the decision itself. *Universal Security Insurance Co.* v. *Koefoed*, 775 F. Supp. 240, 244 (N.D. Ill. 1991). The Supreme court has insisted that courts use caution and restraint when addressing substantive due process claims. *Regents of Univ. of Michigan* v. *Ewing*, 474 U.S. 214, 225-226 (1985). "The potential for application of the judges' own moral and political views is obvious in this context, given the broad and open-ended contours of the right to substantive due process." *Wroblewski* v. *City of Washburn*, 965 F.2d 452 (7th Cir. 1992). Moreover, courts are required to exercise caution so that litigations are not encouraged to recharacterize inadequate procedural due process claims as substantive due process claims. *See Kauth* v. *Hartford Ins. Co. of Illinois*, 852 F.2d 951, 957 (7th Cir. 1988).

In order to state a valid substantive due process claim, a plaintiff must adequately allege: (1) that the government official's decision was arbitrary and irrational, and (2) either that state remedies are inadequate or an additional constitutional provision has been violated. *Koefoed*, 775 F. Supp. at 244; *New Burnham Prairie Homes*, 910 F.2d at 1481; *Kauth*, 852 F.2d at 958.

However, before applying this test, plaintiff must demonstrate that it meets the threshold requirement of establishing an adequate injury to a protectible interest.

The Seventh Circuit has indicated that substantive due process has primarily been used in cases of deprivations of a liberty interest. *See Kauth*, 852 F.2d at 957-58. While it is not apparent from the complaint what type of interest plaintiff believes has been injured, this court surmises that plaintiff is seeking protection of its property interest in keeping its license in this instance.[1] The Seventh Circuit has stated that "an unwarranted investigation by licensing officials conducted in a manner calculated to discourage customers or interfere with a licensee's business may violate a property right." *Easter Home*, 910 F.2d at 1407. However, this court finds that the type of interference with plaintiff's property right which rises to the level of a violation of substantive due process has not been adequately alleged here. As the *Koefoed* court explained: "We presume that the [Seventh Circuit in *Easter Home*] meant that in certain circumstances harassment may result in a deprivation in the constitutional sense, but only where the conduct ultimately caused an actual loss of property or business." 775 F. Supp. at 245. In this case, plaintiff did not lose its license nor was its business adversely affected.

At best, plaintiff alleges that it was subjected to an improperly motivated investigation and harassed by defendants during the survey. To demonstrate that such actions are protectible under Section 1983, plaintiff must demonstrate that it has a right "to be free from unfounded harassment" and that it has suffered a deprivation of constitutional magnitude. *Easter House*, 910 F.2d at 1408. Upon careful review of plaintiff's complaint, this court finds that plaintiff's allegations fail to adequately demonstrate that defendants' alleged harassment rose to the level of a constitutional violation. As stated above, plaintiff did not lose its license or its business was not adversely affected by defendants'

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[1] The Supreme Court has established that a constitutionally protectible property interest arises from some "legitimate claim of entitlement." *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972).

alleged actions. Plaintiff suffered no actual injury other than the cost of going before Quality Assurance to rebut defendants' findings. This does not demonstrate the requisite violation of constitutional magnitude which would entitle plaintiff to relief under Section 1983. *See Id.* at 1407. Therefore, plaintiff's substantive due process claim also fails on this basis.

Plaintiff's equal protection and free exercise claims are also inadequate because they fail to demonstrate violations of constitutional magnitude. As stated above, plaintiff fails to adequately demonstrate that it suffered an injury which rises to the level of a constitutional violation as a result of defendants' alleged actions. Indeed, with respect to plaintiff's free exercise claim, plaintiff does not even allege that defendants' actions deprived plaintiff's owners of their right to exercise their religious beliefs. Therefore, plaintiff's equal protection and free exercise claims must also be dismissed.

This court's determinations with respect to plaintiff's Section 1983 claim are equally applicable to plaintiff's Section 1985 claim. Plaintiff's failure to adequately allege an injury or deprivation of constitutional magnitude and the availability of an adequate post-deprivation remedy demonstrate that plaintiff's Section 1985 claim should be dismissed because it fails to state a claim for which relief can be granted. Having determined that plaintiff's Section 1983 and 1985 claims fail to state a claim for which relief can be granted, this court grants defendants' motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6).

Conclusion

For the aforementioned reasons, defendants' motion to dismiss plaintiff's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) is granted.

ENTER:

Ann Claire Williams, Judge
United States District Court

Dated: March 31, 1993

C-11

IN THE

United States District Court
For The Northern District Of Illinois

EASTERN DIVISION

SHERWIN MANOR NURSING CENTER, INC.,

Plaintiff,

v.

JUDITH MCAULIFFE; CHARLES DECUIRRE; YOLANDA PEPPERS; JOANNE SERPICO; FAY CHIN; and PATRICIA BEST.

Defendants.

Case No. 92 C 6659

MEMORANDUM OPINION AND ORDER

Plaintiff, Sherwin Manor Nursing Center, Inc. brought this suit against defendants, Judith McAuliffe, Charles DeCuirre, Yolanda Peppers, Joanne Serpico, Fay Chin and Patricia Best ("defendants"), alleging that defendants deprived plaintiff of its due process rights under the First and Fourteenth Amendments, its free exercise rights under the First Amendment, and its right to equal protection under the Fourteenth Amendment in violation of 42 U.S.C. §§ 1983 and 1985 ("Sections 1983 and 1985").[1] Defendants subsequently filed a motion to dismiss plaintiff's complaint for failure to state a valid claim pursuant to Federal Rule of Civil Procedure 12(b)(6).

On March 31, 1993, this court issued an opinion granting defendants' motion. In this opinion, this court recognized that in order to state valid Section 1983 and 1985 claims, plaintiff was required to demonstrate that the conduct complained of was committed by a person acting under the color of state law, and this conduct deprived plaintiff of rights, privileges, or immunities

[1] For a thorough explanation of the facts of this case, see this court's March 31, 1993 opinion on defendants' motion to dismiss.

secured by the Constitution or laws of the United States. *See New Burnham Prairie Homes* v. *Village of Burnham*, 910 F.2d 1474, 1479 (7th Cir. 1990); *Parratt* v. *Taylor*, 451 U.S. 527, 535 (1981).

After careful review of the complaint, this court determined that plaintiff failed to adequately demonstrate an injury of constitutional magnitude.[2] Plaintiff did not lose its operating license nor was its business activity interrupted by defendants' conduct. At most, plaintiff was required to go through the established review process before having various violations withdrawn.[3] Since this court found that this cost did not constitute a deprivation of constitutional magnitude, this court granted defendants' motion to dismiss.

This case is currently before the court on plaintiff's motion pursuant to Federal Rule of Civil Procedure 59(e) ("Rule 59(e)") to alter or amend this court's March 31, 1993 order granting defendants' motion to dismiss. For the reasons stated below, plaintiff's motion is denied.

The Motion to Alter or Amend Judgment

"The purpose of a motion to alter or amend is not to give the moving party another "bite at the apple" by permitting the arguing of issues and procedures that could and should have been raised prior to judgment but to provide a procedure by which a court can correct manifest errors of law or fact, or consider newly discovered evidence. Therefore, at a minimum, Rule 59(e) requires the moving party to present newly discovered evidence or identify a manifest error of law or fact." *In re Kress Road Partnership*, 134 B.R. 309, 311 (Bankr. N.D.Ill. 1991), citing *In re BNT Terminals, Inc.*, 125 B.R. 976, 977 (Bankr. N.D.Ill. 1990).

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[2] For the purposes of the motion to dismiss, defendants did not contest plaintiff's claim that defendants acted under color of state law.

[3] This court also determined that plaintiff's due process claim must fail because plaintiff was afforded and took advantage of an adequate post-deprivation remedy.

In this case, plaintiff does not contest this court's determination that its due process claims should be dismissed. Plaintiff only objects to this court's determination that its free exercise and equal protection claims should be dismissed. Plaintiff argues that this court improperly determined that its free exercise and equal protection claims do not rise to the level of a constitutional violation.

Initially, this court notes that Rule 59(e) is not intended to be used to flush out arguments that should have been addressed more thoroughly during the pendency of the original motion. In the original motion, plaintiff only devoted approximately 1 page to these claims. Rather than explaining how defendants' actions violated these constitutional rights, plaintiff merely asserted that the free exercise clause prohibited the imposition of burdens on persons because of their religious beliefs and the equal protection clause prohibited discrimination on the basis of religion. As stated above, Rule 59(e) motions are not intended to give parties the opportunity to reargue their case. This is exactly what plaintiff has done here.

Plaintiff contends that this court has misconstrued applicable equal protection law by determining that its claim does not rise to the level of a constitutional violation. This court agrees with plaintiff that religious minorities fall within the classification of the type of "discrete and insular minority" which the equal protection clause is designed to protect. *See United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938). This court further agrees with plaintiff that "every equal protection violation is *per se* of constitutional magnitude."[4]

However, this court does not find that plaintiff's allegations adequately demonstrate a valid equal protection violation. To state a valid protection claim, plaintiff must allege that it was treated differently than similarly situated facilities. *See Plyler* v. *Doe*, 457 U.S. 189, 216 (1982). This court does not find that plaintiff's allegations adequately suggest that plaintiff was

[4] Plaintiff's Rule 59(e) Motion to Alter or Amend Judgment at 3.

treated differently than similarly situated facilities. Like other nursing homes, violations assessed against plaintiff were automatically reviewed by a review board. And, like other facilities, plaintiff was given the opportunity to present evidence to refute violations and violations which the review board found to be unwarranted were withdrawn.

This court is also not persuaded that plaintiff's free exercise allegations demonstrate a valid constitutional injury. As plaintiff suggests, the free exercise clause prohibits the denial of benefits or the imposition of burdens on persons because of their religious beliefs. Plaintiff contends that the instant case is comparable to *McDaniel* v. *Paty*, 435 U.S. 618 (1978), where the Supreme Court found that a state statute improperly deprived the plaintiff of the opportunity to serve as a delegate to a state constitutional convention because he was a minister. *Id.* at 629. However, *McDaniel* is distinguishable from the instant case. While the *McDaniel* plaintiff suffered a deprivation and penalty because of his religious beliefs, plaintiff did not suffer such a deprivation or penalty. As stated above, plaintiff did not lose its operating license or its federal certification, and its business activity was not interrupted. Moreover, plaintiff was automatically given the opportunity to refute the violations assessed against it by defendants when appearing before the review board and those violations which the review board found to be unwarranted were withdrawn. Plaintiff concedes that those violations which were not withdrawn were of the type and nature routinely expected of a comprehensive survey.

This court also notes that the plaintiff did not clearly allege its free exercise claim in the complaint as required to survive a motion to dismiss. At best, in Paragraph 51, plaintiff asserted that defendants demonstrated anti-Jewish conduct during the course of the survey. *See* Complaint at 17, ¶ 51. Even construing the complaint in the light most favorable to the plaintiff as required on a motion to dismiss, the above noted statement does not suffice to adequately apprise defendants of the claims against them.

Plaintiff also refutes this court's determination that the costs of presenting evidence to the review board do not constitute recoverable damages. Plaintiff contends that these expenses were proximate and foreseeable consequential damages resulting from defendants' conduct which can be recovered as compensatory damages. As this court explained in its March 31, 1993 opinion, the Seventh Circuit has established that "legal fees expended by the plaintiffs in the administrative proceedings cannot qualify as a constitutional injury absent a showing of deprivation of constitutional magnitude." *Easter House* v. *Felder*, 910 F.2d 1387, 1407 (7th Cir. 1990), *cert. denied*, 111 S. Ct. 783 (1991) (citing *Reichenberger* v. *Pritchard*, 660 F.2d 280 (7th Cir. 1981)). This court has already determined that plaintiff's allegations fail to demonstrate an injury of constitutional magnitude. Therefore, the expenses incurred in appearing before the review board are not recoverable as compensatory damages.

Finally, plaintiff argues that even if it could not prove actual damages for the violation of its constitutional rights, it still would be entitled to recover nominal damages. This court agrees with plaintiff that nominal damages are appropriate to recognize a violation of rights when there is no actual, provable injury. *Sahagian* v. *Dickey*, 827 F.2d 90, 100 (7th Cir. 1987). However, this assumes that an adequate deprivation of plaintiff's rights has been proven. This court has found that plaintiff has not adequately alleged a deprivation of a constitutional right which warrants a recovery under Sections 1983 and 1985. Therefore, contrary to plaintiff's contention, nominal damages are not appropriate in this case. Plaintiff's motion to alter or amend judgment is denied.

Conclusion

For the reasons stated above, plaintiff's motion to alter or amend judgment pursuant to Federal Rule of Civil Procedure 59(e) is denied.

ENTER:

Ann Claire Williams, Judge
United States District Court

Dated: June 2, 1993

APPENDIX D

STATUTES INVOLVED

42 U.S.C. § 1983 Provides:

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1985 (3) Provides:

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or

property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Supreme Court, U.S.
FILED
AUG 2 1995
CLERK

(2)

No. 95-21

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JUDITH MCAULIFFE, CHARLES DECUIRRE, YOLANDA PEPPER, JOANN SERPICO, FAY SHIN, AND PATRICIA BEST,

Petitioners,

v.

SHERWIN MANOR NURSING CENTER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a business owned by Orthodox Jews that has been subjected by state officials to unique administrative burdens because of the officials' manifest hostility to Orthodox Jews may maintain an action under 42 U.S.C. § 1983 for violation of its constitutional right to equal protection of the laws.

2. Whether such a business may maintain an action under 42 U.S.C. § 1983 for violation of the constitutional guarantee of free exercise of religion.

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No. 95-21

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

JUDITH McAULIFFE, CHARLES DeCUIRRE, YOLANDA PEPPER, JOANN SERPICO, FAY SHIN, AND PATRICIA BEST,

Petitioners,

v.

SHERWIN MANOR NURSING CENTER, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT

The respondent ("Sherwin Manor") is a nursing home owned and operated by Orthodox Jews, and its residents are largely Jewish. In December 1991, six surveyors of the Illinois Department of Public Health performed Sherwin Manor's annual licensure and certification survey. Motivated by anti-Semitism, the surveyors fabricated allegations against Sherwin Manor and submitted a 124-page

report filled with false and meritless allegations. During the course of the survey, the Public Health officials made a number of outrageous remarks that manifested their religious prejudice:

> "They are Jews, you can't trust them."
>
> "She's a Jew and a liar — you can't trust her."
>
> "These Jews, they have Pollacks who can't read or speak English."
>
> "These Jews, they don't tell anyone they have a Kosher kitchen."
>
> "They are terrible, vicious rotten people."

On receiving a copy of the report — which included 28 false findings of federal violations that resulted in the immediate initiation of federal decertification proceedings — Sherwin Manor hired counsel who bypassed the ordinary administrative appellate process and presented taped, documentary and photographic evidence to supervisory personnel at the Department of Public Health. Sherwin Manor was forced to take this extraordinary action because, among other things, the surveyors' false report threatened the facility with the potential loss of Medicare and Medicaid funds before any normal administrative appeal could be concluded. As a result of its presentation, the supervisors withdrew 73 pages of the surveyors' findings, unconditionally renewed Sherwin Manor's state license, and recommended to federal authorities that Sherwin Manor be recertified.

Sherwin Manor thereafter filed a complaint under 42 U.S.C. §§ 1983 and 1985(3) against the surveyors seeking damages and attorneys' fees for constitutional violations. The defendants moved to dismiss, and the district judge granted the motion on the ground that Sherwin Manor "has not suffered an actual constitutional injury" (Pet. App. C-5). The district judge held that Sherwin Manor had taken advantage of "an adequate post-deprivation remedy" (Pet. App. C-6).

Sherwin Manor then filed a motion under Rule 59(e) of the Federal Rules of Civil Procedure, elaborating on its Equal Protection and Free Exercise of Religion claims. The district judge rejected the equal protection claim on the ground that Sherwin Manor was given the same right as other nursing homes to present evidence to a review board to review violations (Pet. App. C-14). She also rejected the free exercise claim on the ground that Sherwin Manor had suffered no "deprivation or penalty" (*id.*).

On appeal, the Seventh Circuit reversed the dismissal of the complaint and remanded for a trial. The court of appeals held that Sherwin Manor had a "cognizable equal protection claim" because "it was subjected to differential treatment by the state surveyors based upon the surveyors' anti-Semitic animus" (Pet. App. A-7). The court of appeals distinguished, in this regard, between a procedural due process injury, which "does not typically arise until the proceedings are at a mature state," and claims based on the Equal Protection Clause and the Free Exercise Clause, which may be asserted if the claimants are discriminatorily subjected to "special administrative burdens" because of their religion. The Seventh Circuit panel distinguished the Seventh Circuit cases on which the petitioners had relied for the proposition that there was no cognizable constitutional injury if "random and unauthorized acts" are remedied by usual appellate procedures.

REASONS FOR DENYING THE WRIT

I

THE CIRCUITS AGREE ON THE RULE GOVERNING EQUAL PROTECTION CLAIMS

Petitioners acknowledge that there is no conflict among the Circuits. With this decision, the Seventh Circuit joins the Sixth and the Eighth Circuits, which have held that an equal protection claim may be made even by a party who has an available state remedy. *See Watts v. Burkhart*, 854 F.2d 839, 842 (6th Cir. 1988); *Williams v. City of St. Louis*, 783 F.2d 114, 118-119 (8th Cir. 1986).

The Ninth Circuit also sustained a similar claim in *Flores v. Pierce*, 617 F.2d 1386 (9th Cir. 1980), *cert. denied*, 449 U.S. 875 (1980), and the Seventh Circuit discussed and relied on that precedent in this case (Pet. App. A-8). Even assuming *arguendo*, therefore, that Sherwin Manor had an "available state remedy," the decision below permitting it to proceed with a Section 1983 action to redress the equal protection violation is consistent with the uniform trend of decisions in the various circuits.

In *Zinermon v. Burch*, 494 U.S. 113, 125 (1990), all Justices of the Court recognized that the rule of *Parratt v. Taylor*, 451 U.S. 527 (1981), was limited to procedural due process claims. This Court has thus made it clear, after the Sixth and Eighth Circuit decisions, that *Parratt* does not bar Section 1983 actions for substantive constitutional violations. *Cf. Albright v. Oliver*, 114 S. Ct. 807, 819 (1994) (Kennedy, J., and Thomas, J., concurring in the judgment) (the *Parratt* rule applies to suits based on "the Due Process Clause of the Fourteenth Amendment *simpliciter*").

II

SHERWIN MANOR WAS COMPELLED TO INVOKE AN EXTRAORDINARY REMEDY

Petitioners misstate this case and the issue it presents when they assert that Sherwin Manor "successfully avail[ed] itself of an established administrative remedy" (Pet. i; *see* Pet. 4, 6). Had it invoked the usual state remedy, it would have suffered irreparable harm. In fact, Sherwin Manor secured a correction of the fabricated and false report only because it was forced to bypass the "available state remedy" and demonstrated, to the satisfaction of the Department of Public Health supervisors, that the surveyors had acted outrageously.

The issue presented by this case, therefore, is whether an action under Section 1983 may be maintained to obtain redress for an equal protection violation where damages were mitigated somewhat by an extraordinary recourse to high-level government personnel. That issue has not been the subject of other litigation and does not, at this juncture, warrant review by this Court.

III

SHERWIN MANOR'S CONSTITUTIONAL LIBERTY UNDER THE FIRST AMENDMENT IS WELL ESTABLISHED

Citing a 1977 decision of the Fifth Circuit, petitioners assert that there is a serious question as to whether an institution, as opposed to an individual, may invoke the Free Exercise of Religion Clause of the First Amendment (Pet. 10). This Court's decisions after 1977 have firmly

established the availability of such a right. *See, e.g., Bob Jones University v. United States*, 461 U.S. 574, 603-04 (1983); *Jimmy Swaggart Ministries v. Board of Equalization*, 493 U.S. 378, 390-92 (1990); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 113 S. Ct. 2217 (1993). It is now "settled law" that religious institutions "may sue to vindicate organizational interests protected by the free exercise clause of the First Amendment." *The Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 521 (9th Cir. 1989).

IV

REVIEW AT THIS JUNCTURE WOULD BE PREMATURE

In any event, the Seventh Circuit's decision reversed dismissal of the complaint and remanded the case for discovery and trial. There is, as yet, no judgment on the merits. Review by this Court at this stage of the case would, therefore, be premature.

This Court has traditionally been reluctant to review decisions of federal courts of appeals that are not final judgments. *See, e.g., Virginia Military Institute v. United States*, 113 S. Ct. 2431-32 (1993) (Scalia, J., concurring); *Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting); *Brotherhood of Locomotive Firemen v. Bangor & Aroostock R. Co.*, 389 U.S. 327, 328 (1967); Stern, Gressman, Shapiro & Geller, Supreme Court Practice 195-196 (7th ed. 1993). If Sherwin Manor ultimately prevails at trial and an important issue concerning the meaning or application of 42 U.S.C. § 1983 is presented by that judgment, it may be reviewed at that juncture in this Court. Compare, *e.g., Parratt v. Taylor*, 451 U.S. 527 (1981) (review after entry of summary judgment for the plaintiff).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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